Koperasi Mahadaya Bhd v Koperasi Polis Diraja Malaysia Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–2653 OF 2009 AND W–02–2677 OF 2009
LOW HOP BING, ABU SAMAH AND AZAHAR MOHAMED JJCA
14 DECEMBER 2011

Contract — Deposit — Forfeiture — Refund of deposit — Property sale and purchase agreement — Sale price of RM1.4m — RM1m paid as 'deposit and part payment' — Contract terminated due to failure to pay balance purchase price — Whether seller may forfeit RM500,000 — True deposit only 10% of purchase price

Contract — Frustration — Contract becoming impossible of performance — Effects of contract being frustrated — Discharge of contract and recovery of monies paid — Civil Law Act 1956 s 15

Contract — Sale and purchase of land — Breach — Failure to pay balance of purchase price on time — Whether breach of a fundamental term — Whether seller entitled to terminate agreement and forfeit deposit — Whether lands to be retransferred to seller

Land Law — Indefeasibility of title and interests — Fraud — Transfer of land — Whether transfer of title procured by fraud or dishonesty — Land transferred to purchaser under terminated sale and purchase agreement — Whether title defeasible and ought to be set aside — Whether proviso to s 340(3) of the National Land Code applicable — National Land Code s 340(3)

Land Law — Sale of land — Validity of agreement — Application of nemo dat quad non habet principle — Whether purchaser of land under validly terminated sale and purchase agreement can resell land to third party

Koperasi Polis DiRaja Malaysia Bhd ('KPDRM') was the original owner of three parcels of agricultural land in Kertih, Terengganu ('the land'). Pursuant to a sale and purchase agreement ('SPA1') KPDRM agreed to sell the land to Koperasi Mahadaya Bhd ('Mahadaya') for RM1.4m. Upon execution of SPA1 Mahadaya paid KPDRM RM1m as 'deposit and part payment'. The balance of RM400,000 ('the balance') was to be paid to KPDRM's solicitors as stakeholders within one month or such extended period as may be agreed.

SPA1 also provided that in the event Mahadaya failed to pay the balance within the specified time or extended period, KPDRM was at liberty to forfeit as agreed damages, RM500,000 ie 50% of the sum of RM1m paid, and the balance shall be returned to Mahadaya. Due to Mahadaya's failure to pay on time, KPDRM terminated SPA 1 and forfeited 50% of the deposit. However, the titles to the Land were not returned to KPDRM. A search revealed that the titles had been registered in Mahadaya's name. In the meanwhile, Mahadaya had negotiated with Reinco Properties Sdn Bhd ('Reinco') to develop the land into a housing estate. Mahadaya and Reinco had entered into a joint venture agreement ('the JVA') and supplemental agreement ('the SA') to develop the land into a housing estate ('the Project'). Reinco was to fully finance the purchase price payable by Mahadaya to KPDRM under SPA1. Reinco was also to pay Mahadaya RM15m from the proceeds of sale of the units in the project, in lieu of 20% of the units built in the project. On 1 June 2001 Mahadaya purportedly terminated the JVA and the SA on alleged grounds of Reinco's failure to pay RM1.2m to Mahadaya under the SA. Learned counsel for Mahadaya submitted that KPDRM's purported termination of SPA1 was invalid and that the land had been rightfully transferred to Mahadaya whose title thereto was indefeasible on the basis of s 340 of the National Land Code ('s 340'). Mahadaya's alternative contention was that if KPDRM was entitled to terminate SPA1, KPDRM could only forfeit RM140,000 ie 10% of the purchase price and must refund RM860,000 ie the balance of the 'deposit and part payment'. The High Court held that: (i) SPA1 was terminated, null and void and that KPDRM was entitled to forfeit RM200,000 from the deposit and part payment; (ii) Mahadaya re-transfer the Land to KPDRM; (iii) the sale and purchase agreement between Mahadaya and Reinco ('SPA2') was null and void; and (iv) Reinco deliver vacant possession of the land to KPDRM. As against Mahadaya and KPDRM, the High Court allowed Reinco's claim for liquidated damages of RM800,000. Hence these appeals by Mahadaya and Reinco.

Held:

(1) The transfer of the land to Mahadaya had to be first supported by Mahadaya's performance of its fundamental contractual obligation to pay the balance, on or before the agreed extension of one month. However, Mahadaya had failed to do so. Clearly, Mahadaya had occasioned a breach of the fundamental term, going to the root of SPA1. Such a situation entitled KPDRM to terminate SPA1. In the circumstances, KPDRM had rightfully exercised the right to terminate SPA1 and that such termination was valid (see para 41).

(2) Mahadaya's purported transfer of the land to itself in the face of non-payment of the balance was wilful and fraudulent. The transfer was unjustifiable as Mahadaya was at the material time not entitled to it at all. The object of the transfer was intended to deprive and to cheat KPDRM

of the existing right of ownership. It was therefore tainted with dishonesty or actual fraud. In law, Mahadaya was obviously not a purchaser in good faith and for valuable consideration. Mahadaya's title having been tainted with fraud was not indefeasible, and was liable to be set aside under s 340(3). Further, Mahadaya had not acquired the title as a purchaser in good faith and for valuable consideration. Hence, the proviso to s 340(3) was inapplicable. Mahadaya's title being defeasible was thus set aside under s 340(3)(a) (see para 47).

(3) The sum of RM500,000 forfeited by KPDRM was not a true deposit. The true deposit should be 10% of the purchase price. That 10% was RM140,000 which should be the forfeiture sum and not RM200,000 as ordered by the learned trial judge; *Selva Kumar all Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (FC) referred; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 (FC) referred; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC) referred; *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 (SC) referred (see para 65).

(4) In view of the finding that SPA1 had been validly terminated and that Mahadaya's title to the Land was defeasible and consequently set aside, there could be no sale of the land by Mahadaya to Reinco under SPA2: *Nemo dat quod non habet* no one (such as Mahadaya) can give that which it has not (see para 66).

(5) The JVA and the SA had become impossible of performance or had been otherwise frustrated. In the JVA and the SA, KPDRM was not a party thereto, and there was no privity of contract. No damages could be ordered against KPDRM in this regard (see para 68).

(6) As the JVA and the SA had become impossible of performance or had been otherwise frustrated, Part VI of the Civil Law Act 1956, more specifically s 15(1) applied so that the parties thereto viz Mahadaya and Reinco were discharged from further performance of the JVA and the SA. Consequently, the sum of RM1.8m which Reinco had paid to Mahadaya under the JVA had to be dealt with under s 15(2) thereof and was recoverable from Mahadaya at the instance of Reinco as money received by Mahadaya for the use of Reinco by whom the RM1.8m was paid. Reinco was thus entitled to recover the total sum of RM1.8m (see para 69).

[Bahasa Malaysia summary

Koperasi Polis DiRaja Malaysia Bhd ('KPDRM') merupakan pemilik sebenar tiga bidang tanah pertanian di Kertih, Terengganu ('tanah'). Menurut satu perjanjian jual dan beli ('PJB1') KPDRM bersetuju menjual tanah tersebut kepada Koperasi Mahadaya Bhd ('Mahadaya') untuk RM1.4 juta. Selepas pemeteraian PJB1 Mahadaya membayar KPDRM RM1 juta sebagai 'deposit

dan sebahagian bayaran'. Baki RM400,000 ('baki') perlu dibayar kepada peguamcara KPDRM sebagai pemegang amanah dalam masa sebulan atau tempoh lanjutan seperti yang dipersetujui. PJB1 menyatakan bahawa sekiranya Mahadaya gagal membayar baki dalam jangkamasa yang ditetapkan atau tempoh lanjutan, KPDRM bebas untuk mengambil RM500,000 sebagai ganti rugi yang dipersetujui, iaitu 50% daripada jumlah RM1 juta yang dibayar dan baki akan dipulangkan kepada KPDRM. Disebabkan Mahadaya gagal membayar pada masa ditetapkan, KPDRM membatalkan PJB1 dan mengambil 50% deposit. Walau bagaimanapun, geran-geran Tanah tidak dipulangkan kepada KPDRM. Carian menunjukkan bahawa geran-geran tersebut telah didaftarkan di bawah nama Mahadaya. Sementara itu, Mahadaya telah berunding dengan Reinco Properties Sdn Bhd ('Reinco') untuk membangunkan tanah tersebut kepada kawasan perumahan. Mahadaya dan Reinco telah memeterai perjanjian usaha sama ('PUS') dan perjanjian tambahan ('PT') untuk membangunkan tanah kepada kawasan perumahan ('projek'). Reinco akan membiayai sepenuhnya harga belian yang perlu dibayar oleh Mahadaya kepada KPDRM di bawah PJB1. Reinco juga perlu membayar Mahadaya RM15 juta daripada hasil jualan unit-unit dalam projek tersebut, sebagai ganti 20% unit-unit yang dibina dalam projek. Pada 1 Jun 2001 Mahadaya dikatakan membatalkan PUS dan PT atas alasan kegagalan Reinco untuk membayar RM1.2 juta kepada Mahadaya di bawah PT. Peguamacara bijaksana yang bertindak bagi pihak Mahadaya menghujah bahawa kononnya pembatalan PJB1 oleh KPDRM adalah tidak sah dan tanah tersebut secara sah dipindahkan kepada Mahadaya di mana geran tersebut tidak boleh disangkal berpandukan s 340 Kanun Tanah Negara ('s 340'). Hujahan alternatif Mahadaya ialah sekiranya KPDRM berhak untuk membatalkan PJB1, KPDRM hanya boleh mengambil RM140,000 iaitu 10% daripada harga belian dan perlu memulangkan RM860,000 iaitu baki 'deposit dan sebahagian bayaran'. Mahkamah Tinggi memutuskan bahawa: (i) PJB1 telah ditamatkan, batal dan tidak sah dan bahawa KPDRM berhak mengambil RM200,000 daripada deposit dan sebahagian bayaran; (ii) Mahadaya memindahkan semula tanah kepada KPDRM; (iii) perjanjian jual dan beli di antara Mahadaya dan Reinco ('PJB2') adalah batal dan tidak sah; dan (iv) Reinco menyerahkan milikan kosong tanah kepada KPDRM. Sebagai tindakan terhadap Mahadaya dan KPDRM, Mahkamah Tinggi membenarkan tuntutan Reinco untuk ganti rugi jumlah tertentu sebanyak RM800,000. Oleh itu rayuan ini dibuat oleh Mahadaya dan Reinco.

Diputuskan:

(1) Pemindahan tanah kepada Mahadaya perlu disokong terlebih dahulu oleh kemampuan Mahadaya untuk memenuhi kewajipan utama kontrak untuk membayar baki, pada atau sebelum lanjutan satu bulan yang dipersetujui. Walau bagaimanapun, Mahadaya gagal berbuat demikian. Secara jelas, Mahadaya mengakibatkan pelanggaran syarat utama yang

merupakan asas PJB1. Keadaan tersebut membolehkan KPDRM untuk membatalkan PJB1. Dalam keadaan ini, KPDRM telah melaksanakan hak untuk membatalkan PJB1 dengan betul dan pembatalan tersebut adalah sah (lihat perenggan 41).

(2) Pemindahan tanah kononnya oleh Mahadaya kepada diri sendiri tanpa bayaran baki merupakan disengajakan dan penipuan. Pemindahan tersebut tidak adil memandangkan Mahadaya pada masa material tidak berhak sama sekali ke atasnya. Tujuan pemindahan tersebut adalah bermaksud untuk menafikan dan menipu KPDRM yang memiliki hakmilik sedia ada. Oleh itu ia dicemari dengan ketidakjujuran atau penipuan sebenar. Dari segi undang-undang, Mahadaya jelas bukan merupakan pembeli suci hati dan untuk balasan berharga. Geran Mahadaya dicemari oleh penipuan dan boleh disangkal dan boleh diketepikan di bawah s 340(3). Seterusnya, Mahadaya tidak mendapat geran sebagai pembeli secara suci hati dan untuk balasan berharga. Oleh itu, syarat kepada s 340(3) tidak boleh digunakan. Geran Mahadaya boleh disangkal dan oleh itu diketepikan di bawah s 340(3)(a) (lihat perenggan 47).

(3) Jumlah sebanyak RM500,000 yang diambil oleh KPDRM bukan merupakan deposit sebenar. Deposit sebenar seharusnya 10% daripada harga belian. 10% tersebut ialah RM140,000 yang merupakan jumlah yang boleh diambil dan bukannya RM200,000 seperti yang diarahkan oleh hakim perbicaraan yang bijaksana; *Selva Kumar all Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (MP) dirujuk; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 (MP) dirujuk; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC) dirujuk; *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 (MA) dirujuk (lihat perenggan 65).

(4) Berdasarkan dapatan bahawa PJB1 dibatalkan secara sah dan bahawa geran Mahadaya kepada Tanah tersebut boleh disangkal dan seterusnya diketepikan, maka tiada jualan Tanah oleh Mahadaya kepada Reinco di bawah PJB2: *Nemo dat quod non habet* tiada sesiapa (seperti Mahadaya) yang memberikan sesuatu yang tidak dimilikinya (lihat perenggan 66).

(5) PUS dan PT menjadi mustahil untuk dilaksanakan atau telah dikecewakan. Dalam PUS dan PT, KPDRM bukannya pihak yang terlibat dan tidak terdapat priviti kontrak. Tiada ganti rugi yang boleh diarahkan terhadap KPDRM berhubung perkara ini (lihat perenggan 68).

(6) Memandangkan PUS dan PT menjadi mustahil untuk dilaksanakan atau telah dikecewakan, Bahagian VI Akta Undang-Undang Sivil 1956, secara spesifiknya s 15(1) digunakan supaya pihak-pihak terlibat iaitu Mahadaya dan Reinco dilepaskan daripada melaksanakan lebih lanjut

PUS dan PT. Seterusnya, jumlah sebanyak RM1.8 juta yang dibayar oleh Reinco kepada Mahadaya di bawah PUS perlu dikendalikan di bawah s 15(2)dan hanya boleh diambil semula daripada Mahadaya oleh Reinco memandangkan wang tersebut diterima oleh Mahadaya untuk kegunaan Reinco di mana RM1.8 juta dibayar. Oleh itu Reinco berhak mendapatkan semula jumlah sebanyak RM1.8 juta (lihat perenggan 69).]

Notes

For cases on deposit, see 3(2)(3) *Mallal's Digest* (4th Ed 2011 Reissue) paras 4109–4136.

For cases on fraud, see 8(1)(2) *Mallal's Digest* (4th Ed 2011 Reissue) paras 3333–3334.

For cases on frustration, see 3(2)(3) *Mallal's Digest* (4th Ed 2011 Reissue) paras 4503–4511.

For cases on sale and purchase of land, see 3(2)(3) *Mallal's Digest* (4th Ed 2011 Reissue) paras 5695–5710.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Datuk Jaginder Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85, FC (refd)

Green v Nixon (1857) 23 Beav 530 (folld)

Hadley v Baxendale (1854) 9 Exch 341 (folld)

Howe v Smith (1884) 27 Ch D 89, 101 (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (refd)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (folld)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd [1994] 1 MLJ 294 (refd)

Morland v Hales and Somerville [1911] 30 NZLR 201

PJTV Denson (M) Sdn Bhd & Ors v Roxy Malaysia Sdn Bhd [1980] 2 MLJ 136 (FC) (refd)

Seah Siang Mong v Ong Ban Chai & Another Case [1998] 1 CLJ Supp 259 (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (folld)

Soper v Arnold (1889) LR 14 App Cas 429, CA (refd)

Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711, SC (refd)

Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101, PC (refd)

Wong Leng Hung v Krishnamurty Nagaratnam (MLJU Case) [2004] MLJU 622; [2005] 8 CLJ 745 (refd)

Legislation referred to

Civil Law Act 1956 s 15(1), (2), Part VI
Contracts Act 1950 s 75
National Land Code s 340, 340(3), 340(3)(a)

Douglas Yee (Lee Kwee Yock with him) (Dougles Yee) for the second respondent.
James Culaz (Culaz & Associates) for the appellant.
Nordin Sulaiman (Nurul Suhada with him) (Ghazi & Lim) for the first respondent.

Low Hop Bing JCA (delivering judgment of the court):

INTRODUCTION

[1] These two relatively complex appeals arose from two consolidated suits in the Kuala Lumpur High Court viz Civil Suit S2–(S5)–21–182 of 2001 ('Civil Suit S2') and Civil Suit S3–22–1150 of 2001 ('Civil Suit S3'). They involve substantially the same parties, and the same properties viz three parcels of agricultural land held under Geran No 9743 Lot 2675, Geran No 9744 Lot 2676; and Geran No 9745 Lot 2677, in the mukim of Kertih, district of Kemaman, Terengganu (collectively 'the land').

[2] In Civil Suit S2, the plaintiff is Koperasi Polis DiRaja Malaysia Bhd ('KPDRM'). After a full trial, as against the first defendant Koperasi Mahadaya Bhd ('Mahadaya'), the High Court made the following orders:

(1) Declaration:

(a) that the sale and purchase agreement executed between KPDRM and Mahadaya on 21 December 2000 ('SPA 1') is terminated, null and void;

(b) that KPDRM is entitled to forfeit RM200,000 from the deposit and part payment of RM1 million;

(c) that KPDRM is at all times the rightful owner of the land;

(d) that any dealing by any party using SPA 1, Transfer Form and Title Deeds (collectively 'the Transfer Documents') after the date of SPA 1 is null and void;

(e) that all entries of transfers of title and memorial effected by any party using the Transfer Documents after the date of SPA 1 are null and void;

(2) Injunction:

(a) that Mahadaya retransfer the Land to KPDRM;

(b) that Mahadaya return the Transfer Documents to KPDRM within 14 days of service of this order;

(c) restraining Mahadaya from using the Transfer Documents to deal with any person whatsoever;

(3) An *order* that Mahadaya deliver vacant possession of the land to KPDRM; and

(4) *Costs.*

[3] Meanwhile, the High Court dismissed Mahadaya's counterclaim for:

(a) a declaration that Mahadaya is the rightful registered owner of the land;

(b) an injunction restraining KPDRM from interfering with the affairs, management and administration of Mahadaya;

(c) specific performance of SPA1;

(d) general damages; and

(e) costs.

[4] As against the second defendant, Reinco Properties Sdn Bhd ('Reinco'), KPDRM obtained the following orders:

(1) Declaration:

(a) that the sale and purchase agreement executed between Mahadaya and Reinco ('SPA 2') is null and void;

(b) that KPDRM is at all material times the rightful owner of the land;

(c) that any dealing by any party using the Transfer Documents after the date of SPA 2 is null and void;

(d) that all entries of transfers of title and memorial by any party after the date of SPA 2 is null and void;

(2) Injunction:

(a) that Reinco return forthwith the Transfer Documents to KPDRM;

(b) restraining Reinco from dealing with any person by using the Transfer Documents and SPA 2;

(3) An *order* that Reinco deliver vacant possession of the land to KPDRM; and

(4) *Costs.*

[5] Civil Suit S3 was filed by Reinco against Mahadaya and KPDRM, based on the joint venture agreement ('the JVA') and supplemental agreement ('the SA') entered into between Mahadaya and Reinco. Reinco claims, inter alia, beneficial ownership of the land on the ground that, pursuant to the JVA, it had provided RM1.8m to Mahadaya to purchase the land. In addition, Reinco sought the following reliefs:

(1) Declaration:

(a) that KPDRM's purported termination of SPA 1 is null and void;

(b) that KPDRM's remedy is in personam against Mahadaya, or Mahadaya's solicitors who gave their undertakings, for the balance purchase price;

(c) that by its letter dated 1 June 2001, Mahadaya was in default by not performing the JVA and the SA, but purporting to terminate the same;

(2) *A vesting order* pursuant to cl 2 of the SA to vest the Land from Mahadaya to Reinco; and a *further order* directing the Registrar of Titles Terengganu to give effect to the prayer herein;

(3) *Damages* for breach of contract to be assessed by the Senior Assistant Registrar;

(4) *Liquidated damages* in the sum of RM800,000.00 with interest at 8% pa from 21 December 2000 to the date of full realisation; and

(5) *Costs* in *Civil Suit S2* and *Civil Suit S3* to be paid by Mahadaya to Reinco.

[6] As against Mahadaya and KPDRM, the High Court allowed Reinco's claim for liquidated damages of RM800,000 with interest at 8% pa from 21 December 2000 to the date of full realisation, and costs to be taxed. However, Reinco's other prayers were dismissed.

[7] Mahadaya and Reinco have, vide these appeals viz Nos W-02–2653 of 2009 and W-02–2677 of 2009, respectively appealed against the aforesaid orders.

SALIENT FACTS IN CIVIL SUIT S2

[8] KPDRM was the original owner of the land.

[9] By letter dated 25 April 2000, KPDRM accepted Mahadaya's offer vide letter dated 5 May 2000 to buy the land for RM1.8m. On 20 May 2000, KPDRM's solicitors forwarded a draft sale and purchase agreement to Mahadaya. However, the parties did not sign the draft agreement.

[10] On 4 December 2000, for some unknown reasons, Mahadaya passed a resolution to purchase the land from KPDRM at a reduced consideration of RM1.4m, which was the purchase price set out in SPA1 (a reference hereinafter to a clause is a reference to that clause in SPA1, unless otherwise stated).

[11] Upon execution of SPA1, pursuant to cl 2(b), Mahadaya paid KPDRM RM1m as 'deposit and part payment'. The balance of RM400,000 ('the balance') was to be paid to KPDRM's solicitors as stakeholders within one month or such extended period as may be agreed by KPDRM, subject to the payment of interest at the rate of 12% pa on the balance. Clause 20 provides for time to be of the essence of SPA1.

[12] Under cl 4(d), if Mahadaya was using its own fund to purchase the land, Mahadaya's solicitors were authorized to effect the transfer of the land to Mahadaya upon receipt by KPDRM's solicitors of the balance.

[13] On the other hand, cl 4(e) stipulates that if Mahadaya was obtaining a loan to finance the purchase, then KPDRM was to deposit the transfer documents with Mahadaya's solicitors who were required to retain them in safe custody until Mahadaya's financier had provided a guarantee or an undertaking to release the loan.

[14] Clause 5 provides that in the event Mahadaya failed to pay the balance within the specified time or extended period (KPDRM has agreed to an extension of one month), then:

(a) KPDRM is at liberty to forfeit, as agreed damages, RM500,000 ie 50% of the sum of RM1m paid, and the balance shall be returned to Mahadaya without interest;

(b) Mahadaya or its solicitors shall return the transfer documents to KPDRM's solicitors;

(c) Mahadaya shall also deliver vacant possession of the land to KPDRM;

(d) Mahadaya shall bear all costs and expenses, if any, incurred by KPDRM; and

(e) SPA1 shall then be terminated and rendered null and void and the parties shall have no claim whatsoever thereunder.

[15] On 4 January 2001, pursuant to SPA1, KPDRM's solicitors forwarded two original titles viz for Lots 2676 and 2677 to Mahadaya's solicitors Ms Sabri, Nazli, Lana and Azizan ('Mahadaya's SPA solicitors').

[16] By letter dated 17 January 2001, Mahadaya's SPA solicitors requested KPDRM's solicitors to forward the transfer documents in order to transfer the land to Mahadaya.

[17] On 1 February 2001, Ms K Mano & Associates, Mahadaya's solicitors for loan documentation ('Mahadaya's loan solicitors') forwarded Mahadaya's cheque (post-dated 10 March 2001) to KPDRM and requested for the original titles to the land.

[18] By letter dated 5 February 2001, KPDRM's solicitors forwarded the original title for the third piece of land, ie Lot 2675, to Mahadaya's SPA solicitors.

[19] However, subsequently, Mahadaya's loan solicitors informed KPDRM that:

(1) The balance would only be released ten days after their banker's meeting on 27 February 2001; and

(2) The bank was not able to approve the facilities at their meeting on 22 January 2001 because the loan documents were not in order.

[20] At Mahadaya's request, KPDRM agreed to extend to 20 March 2001 for payment of the balance with interest at 12% pa, to be made on or before 20 March 2001.

[21] By letters dated 21 February 2001 and 22 February 2001, KPDRM's solicitors notified Mahadaya's SPA solicitors that pending payment of the balance together with interest, Mahadaya's SPA solicitors shall hold the transfer documents as stakeholders and not to present them for registration until all payments have been made.

[22] Vide letter dated 4 April 2001, KPDRM's solicitors notified Mahadaya's SPA solicitors that:

(1) The aforesaid post-dated cheque could not be encashed because Mahadaya had closed its account; and

(2) KPDRM had exercised its right, terminated SPA 1 and forfeited 50% of the deposit under cl 5, and the balance of the deposit would be returned within 14 days from the date of the receipt by KPDRM's solicitors of the Transfer Documents. A copy of the letter of termination was forwarded to Mahadaya.

[23] Earlier, vide letter dated 12 January 2001, Mahadaya's loan solicitors requested Mahadaya's SPA solicitors to return the original titles, held by Mahadaya's SPA solicitors, on Mahadaya's loan solicitors' undertaking that the balance would be paid to Mahadaya's SPA solicitors within 30 days of the transfer of the land to Mahadaya and the registration of the charge in favour of the bank.

[24] Upon receiving KPDRM's letter of termination, Mahadaya's SPA solicitors requested on 11 April 2001 for the return of the original titles which they had given to Mahadaya's loan solicitors.

[25] On 13 April 2001, Mahadaya wrote to KPDRM's solicitors, apologised for the delay and asked for KPDRM's forbearance while they sorted out certain matters. However, KPDRM's solicitors sent a letter dated 25 April 2001 to

Mahadaya's SPA solicitors reminding them of their delay in returning the titles and KPDRM's apprehension regarding the transaction.

[26] On 18 May 2001, Mahadaya's SPA solicitors wrote to KPDRM's solicitors informing them that there had been no response so far from Mahadaya's loan solicitors. KPDRM's solicitors did not receive the titles. A search revealed that on 19 February 2001, the titles were registered in Mahadaya's name.

SALIENT FACTS IN CIVIL SUIT S3

[27] In April 2000, Mahadaya informed Reinco of Mahadaya's offer to purchase the land from KPDRM at RM1.8m, and KPDRM had agreed. Mahadaya then negotiated with Reinco to develop the land into a housing estate.

[28] In early December 2000, Mahadaya informed Reinco that it would be buying the land. As stated earlier, for some unknown reasons, Mahadaya passed a resolution on 4 December 2000 to purchase the land from KPDRM at a reduced consideration of RM1.4m.

[29] Mahadaya and Reinco then entered into the JVA and the SA to develop the land into a housing estate ('the project'). Reinco was to fully finance the purchase price payable by Mahadaya to KPDRM under SPA1. Reinco was also to pay Mahadaya RM15m from the proceeds of sale of the units in the project, in lieu of 20% of the units built in the project.

[30] Pursuant to the JVA and the SA, Mahadaya executed and deposited with Reinco's solicitors an irrevocable power of attorney and a valid and registrable memorandum of transfer in favour of Reinco. Reinco then released RM1.8m to Mahadaya. Mahadaya acknowledged receipt thereof. On 22 February 2001, Reinco lodged a caveat on the land.

[31] On 7 March 2001, Mahadaya gave notice to re-purchase the land from Reinco, but Reinco rejected it.

[32] On 8 March 2001, Reinco gave notice to Mahadaya that Mahadaya had breached the JVA, the SA and various undertakings.

[33] On 9 March 2001, Mahadaya delivered the titles to Reinco. On 30 May 2001, Mahadaya demanded payment and unspecified guarantee from Reinco within 24 hours, failing which Mahadaya would forward RM1.8m to Reinco for release of the titles.

[34] On 1 June 2001, Mahadaya purportedly terminated the JVA and the SA on alleged grounds of Reinco's failure to pay RM1.2m to Mahadaya under the SA.

WAS SPA1 VALIDLY TERMINATED?

[35] Learned counsel Mr James Culaz submitted for Mahadaya that KPDRM's purported termination of SPA1 is invalid and the land had been rightfully transferred to Mahadaya whose title thereto is indefeasible on the basis of s 340 of the National Land Code ('s 340'); and KPDRM's remedy is to recover the balance. Reinco's learned counsel Mr Douglas Yee supported this argument and relied on *Wong Leng Hung v Krishnamurty Nagaratnam* [2004] MLJU 622; [2005] 8 CLJ 745 (HC).

[36] Mahadaya's alternative contention is that if KPDRM is entitled to terminate SPA1, KPDRM can only forfeit RM140,000 ie 10% of the purchase price and must refund RM860,000 ie the balance of the 'deposit and part payment', on the strength of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 (FC); and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569 (FC).

[37] KPDRM's learned counsel Mr Nordin Sulaiman (assisted by Ms Nurul Suhada) submitted in essence that the transfer of the land was caused by the fraudulent act of Mahadaya as Mahadaya has breached cl 2(b) by failing to pay KPDRM the balance, and so under cl 5(a) to (e), KPDRM has the right to terminate SPA1, and forfeit 50% of the sum of RM1m. They relied on, inter alia:

(a) s 75 of the Contracts Act 1950 ('s 75');

(b) *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC); and

(c) *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 (SC).

[38] From the above submissions, the core question for determination by us is:

Given the above salient facts, has KPDRM validly terminated SPA1?

[39] We shall first consider *Wong Leng Hung*, cited for Reinco. The plaintiff there, a foreigner, ('the purchaser') sought specific performance of the sale and purchase agreement in respect of the defendant's ('the vendor's') property in Ampang Jaya, Selangor which the plaintiff agreed to purchase at RM506,000.

The purchaser paid the vendor RM72,000, in addition to a sum of RM400,000 for the redemption of the property charged to the financier. The total amount was more than 90% of the purchase price. The agreement required the purchaser to apply for the approval of the Foreign Investment Committee ('FIC') for the purchase, but did not provide for a completion date and so time was not of the essence thereof. About six months after the execution of the agreement, the vendor purported to terminate the agreement on the ground that the purchaser had failed to expeditiously apply for the FIC approval. The High Court had to decide on the lawfulness or otherwise of the purported termination. Azmel Maamor J (later FCJ) held that the termination was unlawful, and hence granted specific performance.

[40] We pause here to observe that the facts in *Wong Leng Hung*, are readily distinguishable from those in the instant appeals, where time was expressed in cl 20 to be of the essence of SPA1. In the circumstances, we are unable to see how Mahadaya could garner any support there from.

[41] In the instant appeals, the transfer of the land to Mahadaya must first be supported by Mahadaya's performance of its fundamental contractual obligation under cl 5 to pay the balance, on or before the agreed extension of one month. However, Mahadaya has failed to do so. Clearly, Mahadaya has occasioned a breach of the fundamental term, going to the root of SPA1. Simply put, such a situation surely entitles KPDRM to terminate SPA1. In the circumstances, we are in entire agreement with the learned trial judge in finding that KPDRM had rightfully exercised the right to terminate SPA1 and that such termination was valid. We answer the above core question in the affirmative.

PURPORTED TRANSFER OF THE LAND TO MAHADAYA

[42] Our finding on the valid termination of SPA1 leads us to the consideration of the following consequential question:

> Does the purported transfer of the land to Mahadaya give Mahadaya an indefeasible title?

[43] The answer to this question would depend on whether Mahadaya is a purchaser in good faith and for valuable consideration. In other words, we have to decide whether the transfer is tainted with fraud ie actual fraud. The existence or absence of fraud is a question of fact to be determined by reference to the facts and circumstances of each particular case. Authorities on the existence or absence of fraud are therefore purely illustrative.

[44] In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and*

another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639 (CA), at p 679, Gopal Sri Ram JCA (later FCJ) reaffirmed the settled law that one is not a bona fide purchaser until one has paid all one's money under the contract for sale. A person who pays only a deposit and, under the terms of a written or oral contract agrees to pay the balance three months later is not a bona fide purchaser: see also *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294 per Wan Yahya (SCJ); and *Doshi v Yeoh Tiong Lay* [1975] 2 MLJ 85, at p 88 per Gill FJ; and the New Zealand case of *Morland v Hales and Somerville* (1911) 30 NZLR 201.

[45] In *Seah Siang Mong v Ong Ban Chai & Another Case* [1998] 1 CLJ Supp 259, at p321 f–g, Mohd Ghazali J (now FCJ) followed the above principle enunciated in *Aik Ming (M) Sdn Bhd*.

[46] The categories of fraud are not closed. Illustrations include:

(a) effecting a voluntary transfer of land in order to abort the execution proceedings of the judgment creditors: *PJ TV Denson (M) Sdn Bhd & Ors v Roxy Malaysia Sdn Bhd* [1980] 2 MLJ 136 (FC) per Raja Azlan Shah CJ (Malaya) (now HRH The Sultan of Perak), following Romilly MR in *Green v Nixon* (1857) 23 Beav 530 and 535; 53 ER 208 and citing *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 and 106; and

(b) deliberately and dishonestly registering an interest and then transferring the interest, even before the ink is dry, to another person without the consent of the original registered proprietor: *Datuk Jaginder Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 (FC), per Lee Hun Hoe CJ (Borneo).

[47] We are of the view that Mahadaya's purported transfer of the land to itself in the face of non-payment of the balance is, to say the least, wilful and fraudulent. The transfer was unjustifiable as Mahadaya was at the material time not entitled to it at all. The object of the transfer was intended to deprive and to cheat KPDRM of the existing right of ownership. It was therefore tainted with dishonesty or actual fraud. In law, Mahadaya is obviously not a purchaser in good faith and for valuable consideration.

[48] The existence of actual fraud on the part of Mahadaya makes it necessary for us to consider the general provisions of s 340 and the exceptions thereto which, where relevant, merit reproduction as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, … shall, subject to the following provisions of this section, be indefeasible.

(2) The title … of any such person or body shall not be indefeasible — A

(a) in any case of fraud … to which the person or body, or any agent of the person or body, was a party or privy;

(b) …

(c) … B

(3) Where the title … of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and C

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title … acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. D

[49] The above provisions of s 340 are clear and unambiguous. As a general rule, s 340(1) confers indefeasible title on the the registered proprietor of any land. E

[50] The general rule set out in s 340(1) is subject to the exceptions enumerated under sub-s (2) of which sub-s 2(a) is relevant to the instant appeals. Under para (a), such title shall not be indefeasible in the case of fraud to which the person or body, or any agent of the person or body, was a party or privy. F

[51] Where the title is defeasible eg by reason of fraud specified in s 340(2)(a), it shall be liable to be set aside under s 340(3). G

[52] In the circumstances, Mahadaya's title having been tainted with fraud shall not be indefeasible, and is liable to be set aside under s 340(3).

[53] Further, Mahadaya has not acquired the title as a purchaser in good faith and for valuable consideration. Hence, the proviso to s 340(3) is inapplicable. H

[54] Our answer to the aforesaid question is in the negative. Mahadaya's title being defeasible is hereby set aside under s 340(3)(a).

I

RM1M PAID BY MAHADAYA TO KPDRM

[55] Having set aside Mahadaya's title to the land, we must now consider the fate of the RM1m paid by Mahadaya to KPDRM under SPA1.

[56] At pp 48–49 of the appeal record, the learned trial judge opined that RM140,000 equivalent to 10% of the purchase price of RM1.4m should be forfeited, but then ordered that 'a sum of RM200,000 is reasonable to be forfeited', adding that KPDRM was to refund the balance of RM800,000 to Mahadaya, on the ground that the RM1m 'could not be a true deposit since it amounted to 70% of the purchase price'. The finding of the learned trial judge has to be tested by reference to the legal implications of s 75; and the true construction of cl 2(a), (b) and cl 5.

[57] The question that we have to determine is:

> Upon a true construction of cl 2(a), (b) and cl 5 and the legal effect of s 75, is the sum of RM500,000 (being 50% of the RM1m paid under SPA1) a true deposit?

[58] Clause 2(a) expressly provides that the purchaser (Mahadaya) 'covenants and agrees' that Mahadaya 'shall pay to the Vendor' (KPDRM) 'upon execution of this Agreement, the sum of Ringgit Malaysia One Million (RM1,000,000.00) only now (hereinafter referred to as 'the Deposit Sum') being deposit and part payment towards the Purchase Price the receipt of which the Vendor hereby acknowledges'.

[59] Clause 2(a) must be read conjunctively with cl 2(b) and cl 5. Under cl 2(b), in the event of the purchaser's failure and neglect in making payment of the balance, the contracting parties have expressly agreed to allow the vendor to forfeit 50% of the RM1m absolutely as agreed liquidated damages pursuant to cl 5(a). Under cl 5(b), the vendor shall refund the other 50% to the purchase without interest. These clauses must be construed in the light of s 75 and the judicial pronouncements made thereon.

[60] Section 75 reads:

> 75. Compensation for breach of contract where penalty stipulated for
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[61] An authoritative analysis of s 75 is available in *Selva Kumar a/l Murugiah*, where the agreement was for the sale and purchase of a medical practice for RM120,000. Clause (15)(b) thereof provides as follows:

(15)(b) In the event the purchaser shall default in his obligations herein all monies paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and thereupon this agreement shall be deemed null and void and the purchaser shall give up vacant possession of the said premises and shall give us (sic 'up') the said practice to the vendor and shall have not (sic 'no') further rights whatsoever.

(a) RM12,000 was paid on the signing of the agreement by the purchaser who eventually paid a total sum of RM96,000, leaving an unpaid sum of RM24,000;

(b) the vendor wrote to the purchaser terminating the agreement and forfeiting the sum of RM96,000 as 'agreed damages';

(c) in the High Court, the vendor sought and obtained a declaration that the agreement was properly terminated and that he was entitled to the forfeiture sum;

(d) in the appeal to the Federal Court, the issues that arose were:

(i) Whether, in interpreting s 75, a restricted construction ought to be adopted?; and

(ii) if so, whether, bearing in mind the forfeiture clause appearing in the contract, and having regard to the true effect of s 75, it was open in the circumstances for the respondent (vendor) to effectuate the said forfeiture?

(e) *Peh Swee Chin FCJ* (as he then was), delivering the judgment of the court, held, inter alia that:

(i) s 75 ought to be given a restricted construction;

(ii) the evidence showed clearly some actual loss, damages for which could be assessed by settled rules. However, the vendor has brought no evidence to prove damages for the actual loss. Hence, damages had not been proved. The sum of RM96,000 paid towards the purchase price, less RM12,000 ie 10% deposit paid at the signing of the agreement, was to be refunded to the purchaser; and

(iii) the words 'whether or not actual damage was proved to have been caused thereby' in s 75 are limited to those cases where the court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, where a plaintiff in each of them will have to prove damages or the reasonable compensation for the actual damage or loss in the usual ways in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341.

[62] *Selva Kumar*, was subsequently examined in *Johor Coastal Development*

Sdn Bhd, where the appellant ('the vendor') and the respondent ('the purchaser') entered into two identical sale and purchase agreements ('the SPA') whereby the purchaser agreed to purchase two properties respectively. The purchase price was to be paid by six instalments. The purchaser made an initial payment of 12%, and then made subsequent payments amounting to 50% of the purchase price. After that, the purchaser defaulted in payments. The vendor terminated the SPA and forfeited all moneys paid pursuant thereto. The purchaser sued the vendor to recover all the moneys paid.

(a) the High Court ordered the vendor to refund all the moneys paid, as actual damage was not proved and so it could not be determined whether the moneys paid was a reasonable compensation as envisaged by s 75;

(b) the Court of Appeal allowed the vendor's appeal in part by holding that the vendor was entitled to forfeit the initial payment ie 12% of the purchase price as deposit but must refund the balance, as actual damage was not proved;

(c) the vendor obtained leave to appeal to the Federal Court on questions that raised the following issues which are relevant to the instant appeals:

(i) whether the forfeiture was lawful in view of s 75?; and

(ii) whether the Federal Court case of *Selva Kumar*, was good law?

(d) the majority judgment (*Arifin Zakaria CJ (Malaya)* (now CJ Malaysia); and *Alauddin Sheriff PCA* (as he then was), *Hashim Yusoff FCJ*, dissenting, held as follows:

(i) the vendor could not retain the moneys paid, as reasonable compensation, without proof of loss or damage as envisaged by s 75; and

(ii) *Selva Kumar*, is still good law.

[63] The meaning and purposes of a true deposit had been considered by the Privy Council in *Linggi Plantations*, where in the contract of sale dated 26 May 1962, the vendor agreed to sell an estate of 1,488 acres to the purchaser for RM3,775,000. The completion date was on or before 24 August 1962. A 10% deposit of RM377,500 was paid. There was a forfeiture clause should the purchaser fail to complete. The completion did not take place in due time. On 27 August 1962, the vendor gave notice that the contract was at an end and purported to forfeit the 10% deposit under cl 5 thereof.

(a) in the High Court, the purchaser sought a declaration and a return of the 10% deposit. However, Gill J (later CJ (M)) decided in favour of the vendor's right to forfeit the deposit;

(b) on appeal, the Federal Court reversed the High Court decision;

(c) in the final appeal, the Privy Council restored the High Court decision. At p 93 H–I, the Privy Council held that where the construction of the contract is such that the sum of RM377,500 was paid as a true deposit, it was liable to forfeiture; and

(d) at p 94, the Privy Council explained that:

(i) a deposit is not merely a part payment but also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract: *Howe v Smith* (1884)27 Ch D 89 at p 101, per Fry LJ;

(ii) a deposit is a guarantee that the contract shall be performed. If the sale goes on, of course, it goes in part payment of the purchase money for which it is deposited, but if on default of the purchaser, ie if he repudiates, the contract goes off, he can have no right to recover the deposit: per James LJ in *Ex Parte Barrell* LR 10 Ch 512; and

(iii) a deposit serves two purposes:

(A) if the purchase is carried out, it goes against the purchase money; it is a guarantee that the purchaser means business; and

(B) when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not, then the deposit may be rightly and properly forfeited

(see *Soper v Arnold* (1889(LR 14 App Cas 429, per Lord MacNaghten at p 435).

[64] An identical issue arose in *Sun Properties Sdn Bhd*. The purchaser entered into a sale agreement with the vendor to purchase all the shares in a company for RM10m, of which a sum of RM1m ie 10% thereof was paid *as deposit and towards account of the purchase price.* If the purchaser failed to pay any of the instalments under the agreement, the vendor shall be entitled to 'forfeit all sums theretofore paid by the purchaser'. Time was declared to be of the essence thereof. The purchaser failed to pay the first instalment of RM4m on the due date. The vendor repudiated the agreement and forfeited the deposit of RM1m. The purchaser sought a declaration that the forfeiture clause was invalid and unenforceable being in violation of s 75. The Federal Court held the RM1m to be a true deposit and was lawfully and properly forfeited by the vendor.

[65] Applying the principles established in *Selva Kumar a/l Murugiah*, *Johor Coastal Development Sdn Bhd*, *Linggi Plantations* and *Sun Properties*, we hold

that the sum of RM500,000 forfeited by KPDRM is not a true deposit. The true deposit should be 10% of the purchase price. That 10% is RM140,000 which should be the forfeiture sum and not RM200,000 as ordered by the learned trial judge. Hence, our answer to the question under this head is in the negative.

PAYMENT OF RM1.8M BY REINCO TO MAHADAYA

[66] In view of our finding that SPA1 has been validly terminated and that Mahadaya's title to the land is defeasible and consequently set aside, there can be no sale of the land by Mahadaya to Reinco under SPA2: *Nemo dat quod non habet*. No one (such as Mahadaya) can give that which it has not. In other words, no one (such as Mahadaya) can give a better title than it has. That being the case, what remains to be decided relates to the rights and obligations, if any, of Reinco and Mahadaya under the JVA and the SA.

[67] On this issue, as against KPDRM and Mahadaya, the learned trial judge awarded a sum of RM800,000 as liquidated damages to Reinco.

[68] The facts in these appeals clearly show that the JVA and the SA have become impossible of performance or has been otherwise frustrated. In the JVA and the SA, KPDRM was not a party thereto, and there was no privity of contract. No damages can be ordered against KPDRM in this regard.

[69] As the JVA and the SA have become impossible of performance or has been otherwise frustrated, Part VI of the Civil Law Act 1956 (which deals with frustrated contracts), more specifically s 15(1), applies so that the parties thereto viz Mahadaya and Reinco are discharged from further performance of the JVA and the SA. Consequently, the sum of RM1.8m which Reinco has paid to Mahadaya under the JVA shall be dealt with under s 15(2) thereof and shall be recoverable from Mahadaya at the instance of Reinco as money received by Mahadaya for the use of Reinco by whom the RM1.8m was paid. In the circumstances, instead of the sum of RM800,000 awarded by the High Court, Reinco is entitled to recover the total sum of RM1.8m, which we hereby order.

CONCLUSION

[70] On the foregoing grounds, we allow Mahadaya's appeal in Civil Suit S2 in part by varying the forfeiture sum of RM200,000 (from the RM1m paid pursuant to SPA1) and substituting it with the forfeiture sum of RM140,000 as the true deposit being 10% of the total purchase price of RM1.4m, and order KPDRM to refund the balance of RM860,000 to Mahadaya. By consent, each party is to bear its own costs in this Appeal arising from Civil Suit S2.

[71] In Civil Suit S3, we allow Reinco's appeal to the extent that the sum of RM800,000 awarded to Reinco is varied to the sum of RM1.8m, but only against Mahadaya and not against KPDRM.

[72] All the other orders of the High Court (including costs) are hereby affirmed.

[73] In Civil Suit S3, the parties have agreed that both Reinco and KPDRM shall respectively receive from Mahadaya the sum of RM5,000 as costs.

[74] Deposits in Civil Suit S2 and Civil Suit S3 to be refunded to the respective appellants viz Mahadaya and Reinco.

Order accordingly.

Reported by Kanesh Sundrum